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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
Cause No. 49F18-0703-FD-53059

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Francisco Aguinaga appeals an order of restitution that was made a condition of probation as part of the sentence he received following his conviction for Residential Entry,¹ a class D felony. Upon appeal, Aguinaga presents the following restated issue for review: Was the restitution order improper because Aguinaga was not convicted of taking the missing property for which he was required to pay restitution?²

We reverse and remand with instructions.

Jesus Marcial lived in an apartment with his family in Indianapolis. In the fall of 2006, he noticed that items began to disappear from his apartment while he and his wife were away at work. He notified police. Later, Marcial installed a digital camera in his living room that was motion-activated. When Marcial arrived home on February 28, 2007, he reviewed the camera's photos and discovered photos of Aguinaga walking around inside his apartment. Although Marcial was acquainted with Aguinaga, Aguinaga did not have permission to enter into Marcial's apartment. Marcial inspected the contents of his apartment and discovered that \$4200 and several collector's items were missing.

Marcial called police and when they arrived to investigate, he showed them the digital images of Aguinaga and told them who Aguinaga was. Aguinaga was arrested and charged with residential entry as a class D felony. He was convicted as charged following a bench trial and was sentenced to 545 days in prison, with 180 days executed and the balance suspended to probation. As a condition of probation, the court ordered Aguinaga to pay

¹ Ind. Code Ann. § 35-43-2-1.5 (West, PREMISE through 2008 2nd Regular Sess.).

² We note that Aguinaga's appellate brief does not contain a "Summary of Argument" section as required by Ind. Appellate Rule 46(A)(7).

\$4200 in restitution to Marcial.

Aguinaga contends the trial court erred in ordering him to pay restitution for a loss resulting from “a crime with which [he] was never charged, let alone convicted.” *Appellant’s Brief* at 4. The State concedes that Aguinaga is correct, and rightly so. Ind. Code Ann. § 35-38-2-2.3(a)(5) (West, PREMISE through 2008 2nd Regular Sess.) authorizes trial courts to require a defendant, as a condition of probation to “[m]ake restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim.” When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.” *Id.* In interpreting I.C. § 35-38-2-2.3(a)(5), this court has held that restitution may not be ordered for uncharged crimes. *See Hipskind v. State*, 519 N.E.2d 572 (Ind. Ct. App. 1988), *trans. denied*. We have also determined that trial courts may not order restitution in an amount greater than the sums involved in those crimes to which the defendant pleaded guilty or of which the defendant was actually convicted. *See Polen v. State*, 578 N.E.2d 755 (Ind. Ct. App. 1991), *trans. denied*; *cf. Hughey v. United States* 495 U.S. 411 (1990) (an award of restitution under the Victim and Witness Protection Act is authorized only for the loss caused by the specific conduct which forms the basis for the offense of which defendant was convicted and of which he or she is being sentenced).

In the instant case, Aguinaga was convicted of residential entry, which is defined as knowingly or intentionally breaking and entering the dwelling of another person. *See* I.C. § 35-43-2-1.5. The taking of property is not an element of this offense. Moreover, it was not

even alleged that Aguinaga took the \$4200 that the victim claimed was missing; he certainly was not convicted of having done so. Therefore, we reverse the order requiring Aguinaga to pay restitution to Marcial for the allegedly missing money.

The State contends that we should remand with instructions to determine the amount of loss suffered by Marcial as a result of Aguinaga's breaking into his apartment and to issue a revised restitution order reflecting that amount. According to the State, this would include the cost of repairing the sliding glass door that Aguinaga damaged in gaining entry into the apartment. There is evidence to support the State's contention that Aguinaga damaged this door in the process of breaking into Marcial's apartment. Indeed, the trial court stated, in pronouncing judgment,

I cannot conclude otherwise, except that he made entry through the sliding glass door and not the wall and not the ceiling. He did not magically appear. He broke the close [sic]. And the officer testified that the door was damaged in such a way that it could easily be jimmied with a device to open up.

Appellant's Appendix at 73. Accordingly, the court may if it chooses, upon remand, issue a new restitution order after it conducts a hearing to determine (1) the amount of loss incurred as a result of the offense of which Aguinaga was convicted and (2) Aguinaga's ability to pay.

See Jaramillo v. State, 803 N.E.2d 243 (Ind. Ct. App. 2004), *aff'd in this respect*, 823 N.E.2d 1187 (Ind. 2005), *cert. denied*.

Judgment reversed and remanded with instruction.

MAY, J., and BRADFORD, J., concur